

STATE OF ARIZONA  
OFFICE OF ADMINISTRATIVE HEARINGS

\_\_\_\_\_, a Student, by and through  
Parent \_\_\_\_\_,

No. 08C-DP-08030-ADE

Petitioners,

-v-

Avondale Elementary School District No.  
44,

Respondent.

**ADMINISTRATIVE**  
**LAW JUDGE**  
**DECISION**

**HEARING:** April 23-24, 2008

**APPEARANCES:** Petitioners, Parents \_\_\_\_\_ and \_\_\_\_\_, appeared on behalf of themselves and Student \_\_\_\_\_, and were represented by attorney Amy Langerman, AMY G. LANGERMAN, PC; attorney Denise Lowell-Britt, UDALL, SHUMWAY & LYONS, PLC, appeared on behalf of the Avondale Elementary School District No. 44 ("AESD"), accompanied by Melissa McCusker, Acting District Special Education Director, AESD.

**WITNESSES:** For Petitioners: **Patrick Perryman**, Special Services Director, AESD;<sup>1</sup> **Suzanne Oliver**, Founder and Executive Director of Neurological Music Therapy Services of Arizona; **Elaine Berkley**, Private Special Education Consultant; **Christopher Nicholls**, Ph.D., Clinical Psychologist and Independent Evaluator; and \_\_\_\_\_, Mother (hereinafter "Parent").<sup>2</sup>

For Respondent School District: **Neil Stafford**, Psy.D., Psychologist for AESD; **Brenda Doeksen**, M.S., Speech Language Pathologist; **Laura Gieselman**, Occupational Therapist; and **Melissa McCusker**, Acting District Special Education Director, AESD.

**ADMINISTRATIVE LAW JUDGE:** Eric A. Bryant

Parents bring this due process action, on behalf of Student, to challenge an individualized educational program (IEP) proposed by Respondent School District. The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended

<sup>1</sup> Mr. Perryman was called as a hostile witness.

<sup>2</sup> In order to protect confidentiality, Mother's and Student's proper names are not used in the body of this Decision. Mother will be referred to as Mother or Parent.

1 in 2004),<sup>3</sup> and its implementing regulations, 34 Code of Federal Regulations (C.F.R.)  
2 Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes  
3 (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative  
4 Code (A.A.C.) R7-2-401 through R7-2-406.<sup>4</sup>

#### 5 Procedural History

6 Petitioners filed their due process complaint on February 15, 2008. The  
7 complaint challenges a January 2008 IEP created by Student's IEP team and proposed  
8 by Respondent School District. The complaint primarily alleges that Respondent  
9 School District predetermined placement for Student, and also charges that the IEP  
10 does not reflect the academic level of functioning of Student. For these reasons, the  
11 complaint alleges that the proposed January 2008 IEP will not provide Student a free  
12 appropriate public education (FAPE).

13 The parties presented testimony and Exhibits at a formal evidentiary hearing on  
14 April 23 and 24, 2008. Petitioners presented testimony from the witnesses listed above  
15 and offered into evidence Exhibits A through P, all of which were admitted into the  
16 record.<sup>5</sup> Respondent School District presented testimony as noted above and offered  
17 Exhibits numbered 1 through 21, which were also admitted.<sup>6</sup> The record also includes  
18 five DVDs, one of which is part of Petitioners' Exhibit K and four of which are part of  
19 Respondent School District's Exhibit 20.

20 After the hearing, a transcript of the testimony (consisting of approximately 680  
21 pages) was created and filed on May 16, 2008. The parties submitted written closing  
22 arguments, the last of which was filed on August 4, 2008. Extensions of the time by  
23 which to issue the final decision in this matter were granted through November 14,  
24 2008.

#### 25 Post-Hearing Motion to Preclude Three Claims Made at Hearing

26 During written closing argument, Respondent School District raised a procedural  
27 issue that affects the scope of this Decision. This issue is based on evidence

28 <sup>3</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"  
29 IDEA 2004 became effective on July 1, 2005.

30 <sup>4</sup> It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona  
special education law, but have not yet been published by the Arizona Secretary of State.

<sup>5</sup> These Exhibits are listed in PETITIONER'S LIST OF WITNESSES AND EXHIBITS filed April 16, 2008.

<sup>6</sup> RESPONDENT'S LIST OF WITNESSES AND EXHIBITS, filed April 16, 2008.

1 presented at hearing regarding three claims of IEP deficiency: (1) failure to provide for a  
2 one-to-one aide in the IEP; (2) failure to address physical education needs of Student in  
3 the IEP; and (3) failure to provide a behavioral intervention plan as part of the IEP.  
4 These claims were not spelled out in the due process complaint and were specified for  
5 the first time during Petitioners' case in chief. In its response brief, Respondent School  
6 District urged that Petitioners be barred from making these claims, because they are  
7 amendments to the complaint in violation of the procedural rules for IDEA. Respondent  
8 School District is correct that Petitioners have amended the complaint at hearing, but  
9 the claims will not be barred from this decision for the following reasons.

10 Under the IDEA statutes and regulations, a party may amend its complaint only if  
11 (a) the other party consents in writing and is given an opportunity to resolve the  
12 complaint through a resolution meeting, or (b) permission of the presiding officer is  
13 obtained, except that the presiding officer cannot give permission to amend less than  
14 five days before hearing.<sup>7</sup> Here, Petitioners essentially amended the complaint at  
15 hearing by specifying the three claims above. The complaint merely makes the generic  
16 claim that the IEP does not provide FAPE because it does not meet all of Student's  
17 needs; the complaint does not explain the specific needs that have not been met.  
18 These needs were not identified until Petitioners' case in chief. This constitutes a *de*  
19 *facto* amendment of the complaint at hearing and, as such, is not within the parameters  
20 of the IDEA due process complaint procedures.

21 However, Respondent School District did not object or raise a claim of surprise  
22 at the hearing. Indeed, Respondent School District put forth evidence in contradiction  
23 of the three claims during its presentation of evidence. No offer of proof as to  
24 witnesses that would have been called or exhibits that would have been proffered was  
25 made by Respondent School District, not even in its response brief. No objection was  
26 made until the response brief. This is much too late. Had Respondent School District  
27 raised an objection at hearing, the issue could have been addressed in a timely  
28 manner. But, the objection was not raised and now the record is closed. Thus,  
29  
30

<sup>7</sup> 20 U.S.C. § 1415(c)(2)(E); 34 C.F.R. § 300.508(d)(3). In addition, an amended complaint starts the resolution and hearing timelines over again. *Id.*

Respondent School District failed to timely object to the amendment of the complaint and has waived it.<sup>8</sup>

Therefore, Respondent School District's motion to bar them is denied. The three claims of IEP deficiency noted above, specified for the first time at the hearing, will be addressed herein.

### Introduction

The Administrative Law Judge has considered the entire record, including the testimony and exhibits,<sup>9</sup> and now makes the following Findings of Fact, Decision, and Order finding that the January 2008 IEP proposed by Respondent School District does not offer FAPE because it is not accurate and not complete, and ordering Respondent School District to reconvene an IEP team to draft a new IEP.

### FINDINGS OF FACT

1. Student is [REDACTED]-year-old girl who is eligible for special education and related services under the IDEA in the categories of autism and speech/language impairment. She resides with her parents within the boundaries of Respondent School District, which is responsible for providing an appropriate individualized educational program (IEP) for her. Autism is a spectrum disorder, meaning its symptoms can be highly individualized and present to a greater or lesser degree.<sup>10</sup> Here, Student has severe sensory input dysregulation, such that it is difficult for her to learn without sensory supports. She has great difficulty communicating expressively, both verbally and in writing. This makes it difficult to determine her level of knowledge.

### Education in California-2006

2. At the start of the 2006-2007 school year (her [REDACTED]-grade year), Student resided in California and was educated under an IEP developed there. That IEP, created in March 2006, provided for an Applied Behavioral Analysis (ABA) program with

<sup>8</sup> The rule applicable to amending complaints is intended to protect the non-amending party from lack of notice or surprise. The non-amending party has a right to reasonable notice of the claims that will be addressed at hearing. In the circumstances here, Respondent School District sat on that right and participated in two days of hearing without objection, even addressing the claims in its own presentation of evidence. This appears to have been a tactical decision. Respondent School District cannot now invoke its right; it has essentially consented to the amendment.

<sup>9</sup> The Administrative Law Judge has read and considered each admitted Exhibit (and watched each DVD exhibit), even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness called, even if not mentioned in this Decision.

<sup>10</sup> This is why the phrase "high functioning" is used to describe some people with autism.

1 class/small group instruction in a self-contained setting (and at-home ABA services two  
2 days a week), a one-to-one (1:1) aide, speech services, occupational therapy services,  
3 and Adaptive Physical Education (A.P.E.) services.<sup>11</sup> The California IEP called for  
4 Student to participate in general education only for lunch, recess, passing periods, and  
5 "school day activities."<sup>12</sup> The California IEP had goals in the areas of attention span,  
6 pragmatic language, expressive and receptive language, reading, math, social  
7 interaction, and A.P.E. to address gross motor skills.<sup>13</sup> Comments in the IEP document  
8 noted difficulty giving Student standardized testing, because of her sensory and  
9 communication deficits.<sup>14</sup> They also noted that Student had written her complete name  
10 and the alphabet.<sup>15</sup>

11 Education in Arizona-2007

12 3. In early 2007, Student and her family moved to Arizona. Parent enrolled  
13 Student in a private school—Assuming Competence Today (ACT), run by Neurological  
14 Music Therapy Services of Arizona, Inc. in Phoenix, Arizona. ACT specializes in  
15 educating children with autism.<sup>16</sup> In late March 2007 (when Student turned [REDACTED]),  
16 after the California IEP had expired, Parent enrolled Student in Respondent School  
17 District.<sup>17</sup> An IEP meeting was convened and it was decided that Student would be  
18 placed at ACT as an interim district placement through the end of the 2006-2007 school  
19 year, as Respondent School District did not have a program that would meet Student's  
20 needs.<sup>18</sup> At the time, Respondent School District was developing its own autism  
21 program to begin in the 2007-2008 school year. The IEP team recognized that the  
22 California IEP had expired, and it appears that the IEP team agreed to meet again  
23 before school let out in May 2007 to draft an IEP.<sup>19</sup> However, that did not happen.

24 4. During the summer of 2007, Respondent School District established a  
25 program for autistic children that was located at Student's home school. That program  
26 started in August 2007.

27 <sup>11</sup> Exhibit 2A.

28 <sup>12</sup> *Id.* at 8.

29 <sup>13</sup> *Id.* at 3-6.

30 <sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> Exhibit I.

<sup>17</sup> Exhibit 5.

<sup>18</sup> Exhibit 6.

1           5. Student remained at ACT through the end of the 2006-2007 school year and  
2 began [REDACTED] grade in August 2007 at ACT. A meeting of Student's IEP team was set  
3 for September 6, 2007, to discuss developing a new IEP.<sup>20</sup> At that meeting, Parent,  
4 representatives from ACT, and Respondent School District personnel met and several  
5 significant events occurred. First, Respondent School District's representative, Melissa  
6 McCusker, let it be known that she wanted Student to join the new autism program as  
7 soon as possible. Also, Ms. McCusker was concerned because Student had not been  
8 receiving occupational therapy or speech services at ACT.<sup>21</sup> The school district  
9 members of the team noted that Student could get those services immediately in  
10 Respondent School District's new autism program. The district members of the team  
11 wanted to change Student's placement to the new autism program. Parent became  
12 upset, as she had not anticipated that a change of school would be contemplated at the  
13 meeting. She asked that the meeting be postponed so that she could consult with an  
14 advocate and have time to think. She requested that Student be evaluated by  
15 Respondent School District before a new IEP was written. The team agreed to conduct  
16 further evaluations.<sup>22</sup>

17           6. Another significant event at the September 6 meeting occurred when Parent  
18 and ACT representatives informed Respondent School District that Student's primary  
19 mode of communication, acquired by Student at ACT, was a technique called  
20 "facilitated communication" (FC). FC is a controversial augmentative communication  
21 technique for persons with little or no ability to speak and who cannot point reliably. It  
22 involves a facilitator helping the person communicate by assisting the pointing  
23 movements needed for typing on a keyboard or other device. The facilitator holds the  
24 person's forearm or wrist and applies resistance pressure as a sensory help while the  
25 person types on a keyboard or touches a choice. For example, there is video evidence  
26 in the record showing Student touching a choice of one of two index cards—one  
27 marked "yes" and the other "no." Student is asked a yes or no question and then given  
28 the opportunity to respond in this manner. While Student does so, an aide holds her

29 <sup>19</sup> Exhibit 7.

30 <sup>20</sup> Exhibit 9, Meeting Notice.

<sup>21</sup> Student began receiving these services at ACT shortly after this meeting.

<sup>22</sup> Exhibit 9, Notes from meeting.

1 wrist or forearm to apply sensory support. Because Student's expressive language is  
2 much more delayed than her receptive language, and because her sensory input is  
3 severely disregulated,<sup>23</sup> the theory behind FC is that since Student does not have the  
4 language skills to answer verbally much of the time and does not have the sensorimotor  
5 skills to "touch" the correct response without the facilitator providing the sensory support  
6 to the arm or wrist, Student needs this assistance to communicate in this manner.  
7 Student can communicate through other means as well, but is minimally verbal and  
8 needs assistive devices to communicate. She can use a keyboard or touch board if  
9 given this assistance.

10 7. As noted, however, FC is controversial. Studies have shown that the  
11 facilitator, perhaps unconsciously, influences the responses of those being assisted.<sup>24</sup>  
12 For this reason, FC has been labeled as unreliable by major professional associations,  
13 such as the American Academy of Pediatrics, the American Academy of Child and  
14 Adolescent Psychiatry, the American Psychological Association, the American Speech  
15 Language Hearing Association, and others.<sup>25</sup> Respondent School District took this  
16 position as well when Parent requested that the evaluations be done using FC as an  
17 accommodation. In an October 15, 2007, letter to Parent, Respondent School District's  
18 Special Services Director noted Respondent School District's concern that the results of  
19 any testing using FC would be unreliable at best.<sup>26</sup> However, Respondent School  
20 District was willing to conduct its own "quick reliability check" that might, if successful at  
21 showing "reasonable reliability," allow the use of FC in the testing. As a second option,  
22 Respondent School District proposed use of the 2006 California evaluation for the  
23 "educational" portion of the evaluation, supplemented by information from Student's  
24 ACT teacher and facilitator. While there is no explicit documentation of the choice  
25 Parent made, the record reflects that the second option occurred.

26 8. On September 17, 2007, Respondent School District issued a Prior Written  
27 Notice (PWN) that stated that Respondent School District was proposing to change

28 <sup>23</sup> For example, Student needs almost constant oral sensory input. In the documentation and video  
29 evidence in the record, Student almost always has a "chewy" (plastic tube for chewing), or she puts some  
30 other object in her mouth (hair, fingers, etc.). See especially Exhibit 16B at 19, where the evaluating  
psychologist notes that Student needs "constant oral input."

<sup>24</sup> Exhibit 19.

<sup>25</sup> *Id.*

1 Student's placement to the autism program at her home school, re-evaluate Student,  
2 and schedule another IEP meeting.<sup>27</sup> Shortly thereafter, Respondent School District  
3 rescinded this PWN and issued a new one stating that Student would be evaluated and  
4 a new IEP created at a future date.<sup>28</sup> The evidence shows (through reasonable  
5 inference) that the "rush" to get Student out of ACT and into the district's autism  
6 program was due to Respondent School District's concern about Student not receiving  
7 speech and OT services since starting at ACT. Once those services were provided at  
8 ACT in September, Respondent School District's sense of urgency subsided.

9 Evaluating Student and Developing an Arizona IEP: 2007-2008

10 9. During the next several months, Student was evaluated by Respondent  
11 School District staff for speech, OT, and academic and functional levels. In late  
12 November, the IEP team met again to discuss the results. Many issues were discussed  
13 and a long "follow-up" list was created. The team agreed to meet again in late  
14 December 2007. Parent requested an Independent Educational Evaluation (IEE) at  
15 that time.

16 10. On December 20, 2007, the team met as a Multidisciplinary Evaluation  
17 Team and created an updated evaluation report for Student.<sup>29</sup> The team agreed that  
18 Student was eligible for special education in the categories of autism and  
19 speech/language impairment. At the same time, the team met as an IEP team to  
20 create an IEP for Student. The team agreed that Student required speech and OT  
21 services. The team also agreed that Student needed an individualized behavioral  
22 intervention plan to manage her behaviors.<sup>30</sup> Further, the team agreed that Student  
23 has delayed sensory processing and fine motor skills. The team could not reach  
24 agreement on other issues, however, such as Student's level of academic achievement.

25 11. A dispute arose within the team about Student's level of cognitive and  
26 academic functioning. Respondent School District had reasonable doubts about the  
27 reliability and validity of FC, as noted above, and therefore would not allow the use of  
28 FC during testing of Student by Respondent School District's evaluators. They also did

29 <sup>26</sup> Exhibit 12.

<sup>27</sup> Exhibit 11.

<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 16.



1 not allow other accommodations during testing, such as sensory support. This greatly  
2 limited formal testing of Student, who is difficult to test because of her sensory and  
3 communication problems, and evaluators instead had to rely a great deal on  
4 observation of Student, which they performed but to a limited extent. It also meant that  
5 reports from Student's teacher at ACT and information from other ACT staff was very  
6 important, since they had been with Student for some time and knew her well. ACT  
7 reported that Student was doing ██████-grade level work in a general education  
8 curriculum with supports, including FC. Respondent School District members of the  
9 team doubted that Student was performing at that level, based on the limited testing  
10 results and observations, and in the context of their conclusion that the use of FC  
11 yielded unreliable results in academic testing. ACT staff insisted that Student was  
12 functioning academically at ██████-grade level, while Respondent School District  
13 personnel concluded that Student was at a ██████ to ██████ level of  
14 academic functioning, even suspecting a borderline range of cognitive function.

15 12. At the December 2007 meeting, Respondent School District personnel  
16 continued to state their belief that the district autism program was the appropriate  
17 placement for Student.<sup>31</sup> Parent and ACT staff disagreed.<sup>32</sup> In the end, the MET report  
18 reached a conclusion that is consistent with that reached by the Respondent School  
19 District members of the team.<sup>33</sup>

20 13. The MET report notes the findings of the March 2006 A.P.E. evaluation from  
21 California.<sup>34</sup> Those findings indicate a need for addressing Student's gross motor skills.

22 14. The MET report also notes that Student has had a full-time 1:1 aide both in  
23 California and at ACT.<sup>35</sup> The aide's primary function appears to be to provide sensory  
24 and behavioral support for Student, although the aide at ACT also provides FC for  
25 Student. However, the evidence is clear that Student needs a great deal of sensory  
26 support on a continuous basis, and requires a great deal of behavioral support as well.

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28 <sup>30</sup> Exhibit 16B at 24.

29 <sup>31</sup> Exhibit 16A.

30 <sup>32</sup> *Id.*

<sup>33</sup> Exhibit 16B at 23.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> Exhibit 16B, throughout.

15. The team could not finish its meeting in December 2007 and another meeting was set to complete the IEP on January 31, 2008.<sup>36</sup>

16. Meanwhile, Dr. Christopher Nicholls had been hired to perform an Independent Educational Evaluation (IEE).<sup>37</sup> He did not complete his report until mid-February 2008, after the IEP team had met on January 31, 2008. Therefore, the team did not have his report when they completed the proposed IEP.<sup>38</sup>

17. The team met on January 31, 2008, to complete the IEP.<sup>39</sup> The notes for the meeting show that many of the non-academic goals drafted by ACT were accepted by the team and incorporated into the IEP.<sup>40</sup> There was still disagreement among the members of the team, however, with Respondent School District personnel on one side and Parent and ACT personnel on the other, most notably with respect to academic levels of functioning. At Parent's urging, the team put a great deal of information from ACT about Student's academic functioning into the section for indicating present levels of performance.<sup>41</sup> The IEP states that this information is "reported" by ACT. The reported information mostly concerns Student's level of academic performance at the [REDACTED]-grade level. Parent and ACT personnel firmly held that Student was performing [REDACTED]-grade level academic work, and Respondent School District personnel doubted that Student could do work at that level.<sup>42</sup> Respondent School District members of the team took the position that Student was at a lower level of academic performance ([REDACTED]). The academic goals in the IEP finally proposed to Parent reflect Respondent School District's perspective.

18. The notes for the January 31, 2008, IEP meeting do not show that A.P.E. or Student's gross motor skills were discussed by the team. Nothing in the IEP addresses that topic.

19. The issue of whether Student needs a 1:1 aide was discussed by the team. Parent and ACT personnel stated that Student requires a 1:1 aide for personal safety

<sup>36</sup> Exhibit 16A at 7.

<sup>37</sup> Exhibit 21.

<sup>38</sup> Why the team did not wait for Dr. Nicholls' report is not evident in the record. Waiting for that report would have been prudent.

<sup>39</sup> Exhibit 17.

<sup>40</sup> Exhibit 17A at 5-6.

<sup>41</sup> Exhibits 17A (IEP Meeting Notes) and 17B (IEP).

<sup>42</sup> Exhibit 17A.

1 and sensory support.<sup>43</sup> Student's ACT teacher noted that Student was still biting  
2 herself at times.<sup>44</sup> Respondent School District personnel stated that enough adults  
3 were in the district autism classroom that Student did not need an aide dedicated solely  
4 to her. Ms. McCusker stated that a 1:1 aide could be considered at a later date if  
5 Student was demonstrating that level of need. In the end, the IEP does not provide for  
6 a 1:1 aide, except when Student is in "regular education settings."<sup>45</sup>

7 20. On a related topic, the team agreed that Student needs a behavioral  
8 intervention plan, and the final IEP reflects that agreement.<sup>46</sup> However, a plan was not  
9 created at the time. The notes for the meeting reflect that Respondent School District  
10 intends to create a plan at a future date.<sup>47</sup>

11 The January 2008 IEP

12 21. The proposed IEP contains a lengthy section identifying Student's "Present  
13 Level of Academic Achievement and Functional Performance" (PLAAFP).<sup>48</sup> The  
14 section begins by noting health concerns and then describing how her autism affects  
15 her ability to progress in the general education curriculum by pointing out her limited  
16 communication skills, pragmatic language skills, and socialization skills. Her ability to  
17 verbally communicate needs, wants, and ideas is described as "very limited."<sup>49</sup>

18 22. The section in the PLAAFP concerning academic achievement is lengthy  
19 and "reports" the information provided about Student's academics by the ACT school.  
20 That information consists of detailed statements about Student's level of academic  
21 achievements in the areas of math, reading, writing, social studies, and science, and  
22 her level of functioning in the areas of speech/communication, self-help, sensory, and  
23 the use of devices like keyboards, pencils, markers, etc. This information is placed in  
24 quotation marks and prefaced with:

25 "The following information was provided by ACT. It is based on work  
26 samples and informal testing by using various degrees of facilitated  
27

28 <sup>43</sup> Exhibit 17A at 7.

29 <sup>44</sup> *Id.*

30 <sup>45</sup> *Id.* at 7-8.

<sup>46</sup> Exhibit 17B at 9.

<sup>47</sup> Exhibit 17A at 2.

<sup>48</sup> Exhibit 17B.

<sup>49</sup> *Id.* at 4.

1 communication and degrees of accommodations, including verbals,  
2 pointing, word cards and augmentative communication."<sup>50</sup>

3 The academic achievement level section of the IEP ends with information from  
4 Student's March 2006 California IEP<sup>51</sup> that shows her levels from that time in reading,  
5 math written expression, daily living skills and workplace skills.<sup>52</sup>

6 23. The academic levels reported by ACT are [REDACTED]-grade levels. The levels  
7 from the California IEP are [REDACTED] to [REDACTED] levels.

8 24. The academic goals for Student in the January 2008 IEP reflect a [REDACTED]-  
9 [REDACTED] level of academic achievement.

10 Dr. Nicholls' Independent Educational Evaluation

11 25. As noted above, at the request of Parent an IEE of Student was performed  
12 by Christopher J. Nicholls, Ph.D.<sup>53</sup> Dr. Nicholls is a highly-qualified clinical psychologist  
13 who has been practicing in Arizona for many years.<sup>54</sup> As part of his evaluation, he  
14 reviewed documentation about Student, including special education documentation  
15 from California and the December 2007 MET report.<sup>55</sup> He observed Student at ACT for  
16 two hours and in his office on two separate occasions. He attempted to administer  
17 several standardized tests to Student, but had difficulty because of Student's anxiety  
18 and her unreliable pointing responses. Thus, he was not able to obtain reliable  
19 standardized test data for Student.<sup>56</sup> In that situation, he was left with reliance on his  
20 observations of Student to form impressions of her level of functioning.<sup>57</sup> From his  
21 classroom observations, he noted that Student seemed "at least equally competent in  
22 expressing her thoughts verbally, as in her use of the keyboard."<sup>58</sup> Also, he noted that  
23 he was skeptical about "the veracity of claims made regarding [Student]'s academic  
24 competence" because of the use of FC.<sup>59</sup> He described criticisms of FC and agreed  
25

26 <sup>50</sup> *Id.*

27 <sup>51</sup> This IEP had expired in march 2007.

28 <sup>52</sup> *Id.* at 6.

29 <sup>53</sup> Exhibit 21D.

30 <sup>54</sup> Exhibit 21B.

<sup>55</sup> Exhibits 21C and 21D.

<sup>56</sup> Reporter's Transcript of Proceedings ("RTP"), Volume II (April 24, 2008) at 471.

<sup>57</sup> *Id.* at 477.

<sup>58</sup> Exhibit 21D at 4.

<sup>59</sup> *Id.* at 7.

1 with them by noting: "I am less convinced that facilitated communication is actually  
2 allowing the students to express a high level of knowledge."<sup>60</sup>

3 26. Dr. Nicholls states in his evaluation that one of his impressions about  
4 Student is that she demonstrates evidence of both autism and an intellectual  
5 disability.<sup>61</sup> He clarified during his testimony at hearing that this impression was based  
6 on an elevated score of one of the behavior rating scales. Such elevated scores are  
7 "associated" with increased severity of autism and greater cognitive and receptive  
8 language impairment.<sup>62</sup> He admitted that he did not have the formal data necessary to  
9 make a diagnosis of mental retardation, but that this was his "impression" of Student.<sup>63</sup>  
10 Given the lack of formal testing data and the admitted limitations of the evaluation, it  
11 appears that this is merely a suspicion he has formed based on circumstantial and  
12 coincidental information. As such, this "impression" is given little weight.

13 27. Dr. Nicholls concluded that Student was unable to participate in a standard  
14 educational program because she needs high levels of individualized instruction and  
15 support. He noted that she "has the capacity to express her wants and needs through  
16 verbal communication/speech, but does not do so on a consistent basis."<sup>64</sup> In his  
17 opinion, this greatly reduced the need for FC. In addition, he noted that Student's  
18 pointing responses did not seem a reliable means of expressing herself.<sup>65</sup> The  
19 implication from these statements by Dr. Nicholls is that more effort should be put into  
20 having Student communicate with speech and that the use of FC, apart from its  
21 unreliability, is detrimental to that effort. Dr. Nicholls recommended that a primary  
22 emphasis for Student, because of her capacity for expressive language, be an Applied  
23 Behavioral Analysis (ABA) approach to increase verbalization, so that verbal  
24 communication is emphasized over the use of FC.<sup>66</sup> He also stated broadly that he  
25 agreed with the December MET report.

26  
27  
28 <sup>60</sup> *Id.*

29 <sup>61</sup> *Id.* at 6.

30 <sup>62</sup> *Id.*

<sup>63</sup> RTP, Volume II at 479.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> *Id.* at 8.

Suzanne Oliver: Director of Assuming Competence Today (ACT) School

28. At hearing, Suzanne Oliver testified on behalf of Petitioners. Ms. Oliver is a Board-certified music therapist with advanced training in neurologic music therapy.<sup>67</sup> She is founder and Executive Director of ACT. She is highly trained and educated in the field of neurologic music therapy. She has been working with autistic children in classroom settings for almost twenty years and has a great deal of experience with that population and in that environment. She started ACT in February 2007, just before Student began attending. During the initial school startup period, through May 2007, she was in the classroom "all day every day"<sup>68</sup> as a music therapist; she was not the classroom teacher. After that, she has been in the ACT classroom, which has eight students including Student, at least five or six hours a week. Thus, she is very familiar with Student and how Student behaves and functions in the classroom.

29. Ms. Oliver testified about how Student behaves and functions in the classroom, as well as what Student needs in the classroom in order to learn. Her testimony described Student's sensory dysregulation, gross motor skill issues, communication limitations, and severely delayed social/emotional development.

30. Ms. Oliver described Student's sensory dysregulation as a psychomotor regulation disorder (the inability to regulate movement), manifesting itself with the inability to inhibit movement (overflow of movement), the inability to initiate movement, and the inability to sustain movement.<sup>69</sup> When Student first started attending ACT, she was unable to sit still at her desk or in a chair and was characterized as having almost constant movement. She would slam her hands on the desk for sensory input, and would frequently bite things (her shoes, the desk, plastic and wood objects).<sup>70</sup> These behaviors have improved as at ACT Student has received almost constant sensory support from her 1:1 aide<sup>71</sup> and has been learning to give herself appropriate sensory support,<sup>72</sup> although she is not yet independent in this regard. Ms. Oliver also described

<sup>67</sup> RTP, Volume I (April 23, 2008) at 65.

<sup>68</sup> RTP, Volume I at 78.

<sup>69</sup> *Id.* at 68.

<sup>70</sup> *Id.* at 80-83.

<sup>71</sup> *Id.* at 98-99. Ms. Oliver testified that Student needed sensory support at least 95% of the time while she is being instructed. Without this support, she stated that Student will have behavior problems.

<sup>72</sup> *Id.* at 91-93; 97.

gross motor difficulties that Student experiences, indicated by difficulty standing without a support or anchor and general unsteadiness and balance problems.<sup>73</sup>

31. Ms. Oliver testified that Student communicates mainly through words that she spells on various types of devices or communication boards.<sup>74</sup> With her movement regulation problems, the typing is difficult for her and she receives assistance through the use of FC. She needs much encouragement and support to use oral language to read because she has difficulty visually attending and verbally responding.<sup>75</sup> Ms. Oliver described FC as "an external cueing mechanism until an internal cueing mechanism is developed."<sup>76</sup> It provides backwards resistance against the hand or wrist and helps with initiation of movement. So, Ms. Oliver characterized FC as a sensory support to help with pointing.<sup>77</sup>

32. With respect to social/emotional functioning, Ms. Oliver testified that Student has difficulty regulating emotion, and will have behavior problems when she gets frustrated.<sup>78</sup> Student gets frustrated when she can't control her body by regulating her movement. Since regulation of movement is one of her chief difficulties, she is often frustrated, resulting in frequent behavior problems if she is not supported.

33. For all of these issues, Ms. Oliver testified that Student needs a 1:1 aide to provide sensory/motor support through deep pressure input (for example, squeezes to the arm), support for pointing movement so that she can communicate through typing, and behavior support by prompting, encouraging, and providing a constant watchful eye.<sup>79</sup> With a 1:1 aide providing these supports, Ms. Oliver testified that Student is reading at a [REDACTED] grade level.<sup>80</sup>

34. Ms. Oliver believes that Student needs in the classroom: (a) a 1:1 aide providing the sensory supports just described, (b) devices to help her communicate non-verbally through words, (c) behavioral management with positive input and

<sup>73</sup> *Id.* at 87-88.

<sup>74</sup> *Id.* at 83-84.

<sup>75</sup> *Id.* at 86.

<sup>76</sup> *Id.* at 121.

<sup>77</sup> *Id.* at 122.

<sup>78</sup> *Id.* at 89.

<sup>79</sup> *Id.* at 92-99.

<sup>80</sup> *Id.* at 87.

1 encouragement, and (d) a ██████-grade academic level.<sup>81</sup> She also noted that if  
2 Student will be moving from one program to a different type of program, such as that  
3 proposed by Respondent School District, a plan for transitioning Student between the  
4 programs is needed.<sup>82</sup> She noted that in the proposed IEP there is no plan for  
5 transitioning Student.

6 35. This tribunal finds Ms. Oliver to be a credible witness. Her observations and  
7 opinions about Student's abilities, capabilities, and level of functioning are given some  
8 weight, except as they rely on the use FC.

9 36. The record in this case supports a finding that FC is an unreliable  
10 accommodation that is not scientifically valid and produces unreliable information.<sup>83</sup>  
11 Thus, it clouds the issue of Student's academic level of performance. Although Ms.  
12 Oliver is a witness who knowledgeable about Student, her testimony that Student is  
13 capable of doing ██████-grade work is undermined by the fact that Student uses FC to  
14 produce the work product that is the basis of Ms. Oliver's opinion. Therefore, the  
15 weight of her testimony in this regard is diminished.

16 Dr. Neil Stafford: Respondent School District's Psychologist

17 37. Respondent School District called psychologist Neil Stafford, Psy.D., to  
18 testify at the hearing. Dr. Stafford is a clinical psychologist who works for Respondent  
19 School District.<sup>84</sup> He did not evaluate Student in this case, but was a member of the  
20 teams that created the December 2007 MET report and the January 2008 IEP that is at  
21 issue in this case.<sup>85</sup> He reviewed the records regarding Student, including the  
22 California records, the December 2007 MET report, and Dr. Nicholls' evaluation  
23 report.<sup>86</sup> He also reviewed the video evidence that is part of this record.<sup>87</sup>

24 38. Dr. Stafford described autism as a developmental disability affecting social  
25 interactions and communication.<sup>88</sup> It is a "spectrum disorder," meaning that those who  
26 are diagnosed with it have a wide range and variety of functioning levels. He stated

27 <sup>81</sup> *Id.* at 156-163.

28 <sup>82</sup> *Id.* at 166-167.

29 <sup>83</sup> Exhibit 19.

30 <sup>84</sup> Exhibit 2(I).

<sup>85</sup> RTP, Volume II (April 24, 2008) at 344.

<sup>86</sup> *Id.* at 345.

<sup>87</sup> *Id.*

<sup>88</sup> RTP, Volume II at 342-343.



1 that mental retardation often accompanies autism and that it is often difficult to assess  
2 the cognitive abilities of a person with autism because of the diminished communication  
3 ability that may be present.<sup>89</sup> He noted that it was difficult to obtain standardized testing  
4 scores for Student because of her autism and speech disorders. In that circumstance,  
5 standard practice is to rely on clinical observation and clinical interviews with caregivers  
6 and service providers as the basis for any conclusions. Standardized testing would  
7 compare Student to her peers but, without that information, evaluators can still make  
8 statements about Student's level of functioning. Dr. Stafford testified about the  
9 Vineland Adaptive Behavior Scale ("Vineland"), an assessment tool about Student's  
10 adaptive behaviors given as a questionnaire to Student's teacher and as an interview to  
11 Mother.<sup>90</sup> He noted that the results give "a rough estimate" of Student's intellectual  
12 functioning that shows a severe delay.<sup>91</sup> However, he admitted that Student does not  
13 have a diagnosis of mental retardation<sup>92</sup> and that there is not sufficient evidence to  
14 make that diagnosis because she cannot be properly tested. Furthermore, he admitted  
15 that the Vineland score does not always correlate with intellectual functioning.<sup>93</sup>  
16 Nevertheless, it is his belief, and that of the Respondent School District members of the  
17 IEP, that Student has an intellectual disability.<sup>94</sup> He agreed with Dr. Nicholls in this  
18 regard. As with Dr. Nicholls, however, this tribunal finds that this belief was based not  
19 on formal testing of Student's intellectual functioning, but on circumstantial and  
20 coincidental information, including the fact that autism and mental retardation are  
21 "highly co morbid."<sup>95</sup> As such, this belief is speculative and not given much weight.

22 39. Dr. Stafford testified that Student was operating at a [REDACTED] to  
23 [REDACTED] level when she left California. He concluded, based on his review of the  
24 information, that Student was still operating at a [REDACTED] level in  
25  
26

27 <sup>89</sup> *Id.* at 343.

28 <sup>90</sup> *Id.* at 383.

29 <sup>91</sup> *Id.* at 352.

30 <sup>92</sup> *Id.* at 381.

<sup>93</sup> *Id.* at 385.

<sup>94</sup> *Id.* at 376.

<sup>95</sup> *Id.* at 343.

January 2008.<sup>96</sup> However, on cross-examination he admitted that no one really knows Student's level of functioning.<sup>97</sup>

### **CONCLUSIONS OF LAW**

1. This case presents allegations based on the IDEA and its implementing regulations. Petitioners' complaint raises several issues, amongst them the content of the January 2008 IEP, specifically with respect to the present levels of Student's academic achievement and whether the IEP addresses all of her identified needs.<sup>98</sup> The applicable law in these areas is as follows.

### **APPLICABLE LAW**

2. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.<sup>99</sup> These needs include academic, social, health, emotional, communicative, physical, and vocational needs.<sup>100</sup> To do this, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A free appropriate public education (FAPE) consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>101</sup> The IDEA mandates that school districts provide a "basic floor of opportunity," nothing more.<sup>102</sup> It does not require that each child's potential be maximized.<sup>103</sup>

### **Individualized Education Program**

3. Once a child is determined eligible for special education services, a team composed of the child's parents, teachers, and others formulate an Individualized

<sup>96</sup> *Id.* at 378.

<sup>97</sup> *Id.* at 421.

<sup>98</sup> Other issues raised by the parties, including whether pre-determination of placement occurred and whether the placement proposed by the January 2008 IEP is the least restrictive environment, need not be decided by this tribunal, as noted below, due to the this tribunal's conclusion herein that the January 2008 IEP is inaccurate and incomplete. Therefore, the law relating to those issues is not presented here.

<sup>99</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

<sup>100</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

<sup>101</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

<sup>102</sup> *Id.*, 458 U.S. at 200.

<sup>103</sup> *Id.* at 198.

1 Education Program (IEP) that, generally, sets forth the child's current levels of  
2 educational performance and sets annual goals that the IEP team believes will enable  
3 the child to make progress in the general education curriculum.<sup>104</sup> The IEP tells how  
4 the child will be educated, especially with regard to the child's needs that result from the  
5 child's disability, and what services will be provided to aid the child. The child's parents  
6 have a right to participate in the formulation of an IEP.<sup>105</sup> The IEP team must consider  
7 the strengths of the child, concerns of the parents, evaluation results, and the  
8 academic, developmental, and functional needs of the child.<sup>106</sup> In addition, if a child's  
9 behaviors impede the child's learning or that of others, the team must consider the use  
10 of positive behavioral interventions and supports to address those behaviors.<sup>107</sup>

11 4. An IEP is a written document that must include, among other things, a  
12 statement of a child's present levels of academic achievement and functional  
13 performance, noting how the child's disability affects involvement and progress in the  
14 general education curriculum.<sup>108</sup> The IEP also must include measurable annual  
15 academic and functional goals designed to meet the child's needs and enable the child  
16 to make progress in the general education curriculum.<sup>109</sup>

17 5. The present levels of performance described in the IEP are to be based on  
18 evaluations and assessments of the child. In evaluating a child, the school district must  
19 use a variety of means for gathering a variety of information about the student,  
20 including information from the parent.<sup>110</sup> The goal is to gather functional,  
21 developmental, and academic information about the child so that the evaluation is  
22 comprehensive as to the student's educational needs.<sup>111</sup> This information should come  
23 from teachers, parents, medical professionals, and other specialists who have assessed,  
24 evaluated, tested, and observed the student in a variety of settings, but especially in the  
25  
26

27 <sup>104</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 <sup>105</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

29 <sup>106</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

30 <sup>107</sup> 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. §§ 300.324(a)(2)(i).

<sup>108</sup> 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. §§ 300.320(a).

<sup>109</sup> *Id.*

<sup>110</sup> 34 C.F.R. § 300.304(b); 34 C.F.R. § 300.306(c).

<sup>111</sup> 34 C.F.R. § 300.304(c).

1 classroom.<sup>112</sup> Of primary importance are comprehensive educational evaluations  
2 performed by specialists (usually educational psychologists).<sup>113</sup>

3 6. The assessments that are performed must be administered "in the child's  
4 native language or other mode of communication and in the form most likely to yield  
5 accurate information on what the child knows and can do academically,  
6 developmentally, and functionally, unless it is clearly not feasible" to do so.<sup>114</sup>

7 Furthermore, assessments must be administered

8 "so as best to ensure that if an assessment is administered to a child with  
9 impaired sensory, manual, or speaking skills, the assessment results  
10 accurately reflect the child's aptitude or achievement level or whatever  
11 other factors the test purports to measure, rather than reflecting the child's  
impaired sensory, manual, or speaking skills (unless those skills are the  
factors that the test purports to measure)."<sup>115</sup>

12 Finally, the child must be assessed in all areas related to the disability, including, if  
13 appropriate, such areas as behavioral functioning and "motor abilities,"<sup>116</sup> such that an  
14 evaluation "is sufficiently comprehensive to identify all of the child's special education  
15 and related services needs."<sup>117</sup>

### 16 DECISION

17 7. A parent who requests a due process hearing alleging non-compliance with  
18 the IDEA must bear the burden of proving that claim.<sup>118</sup> The standard of proof is  
19 "preponderance of the evidence," meaning evidence showing that a particular fact is  
20 "more probable than not."<sup>119</sup> Therefore, Petitioners bear the burden of proving by a  
21 preponderance of evidence that Respondent School District has failed to provide FAPE  
22 through the January 2008 IEP proposed for Student. Petitioners have met this burden  
23 with respect to: (A) whether the January 2008 IEP accurately states Student's present

24 <sup>112</sup> 34 C.F.R. § 300.305(a); 34 C.F.R. § 300.306(c)(i).

25 <sup>113</sup> See 34 C.F.R. § 300.304(c). Note that educational evaluations are so important that the parent is  
given a right to an independent evaluation at no cost to parent. 34 C.F.R. § 300.502.

26 <sup>114</sup> 34 C.F.R. § 300.304(c)(1)(ii).

27 <sup>115</sup> 34 C.F.R. § 300.304(c)(3).

28 <sup>116</sup> 34 C.F.R. § 300.304(c)(4).

29 <sup>117</sup> 34 C.F.R. § 300.304(c)(6).

30 <sup>118</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioners' argument that the burden of proof  
is shifted in this case is without merit and is hereby summarily rejected.

<sup>119</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
(1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,  
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No.*  
*J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 levels of academic achievement and (B) whether the January 2008 IEP addresses all of  
2 Student's needs.

3 8. This tribunal's review of the January 2008 IEP is limited to the contents of the  
4 document.<sup>120</sup> Therefore, the questions of whether the IEP is accurate and complete must  
5 be decided on the basis of the content of the IEP itself.

6 *A) Is the January 2008 IEP accurate?*

7 9. The January 2008 IEP, in its description of Student's present levels of  
8 academic achievement, states [REDACTED]-grade academic levels as "reported" by ACT for  
9 2007 and also describes [REDACTED] academic levels from Student's  
10 education in California in 2006. This reflects the IEP team's split of opinion with regard  
11 to Student's academic levels. The academic goals in the January 2008 IEP, however,  
12 do not reflect both opinions, they reflect only the lower levels of academic performance.  
13 However, these goals, and the consequent inference that the IEP essentially rates  
14 Student's academic levels at [REDACTED], are not supported by the  
15 record. This rating of Student at the lower levels of academic performance is (1)  
16 inconsistent with the description of Student's present levels in the January 2008 IEP  
17 (because it ignores the data reported by ACT, data that is included in the IEP), (2)  
18 based on the mere suspicion that Student is intellectually disabled, and (3) based on  
19 information obtained from evaluations that were not conducted in accordance with IDEA  
20 regulations.

21 The January 2008 IEP's Description of Student's Academic Levels

22 10. First, Student's level of academic achievement is unclear. As Dr. Stafford  
23 admitted, no one knows Student's actual level of academic performance. This lack of  
24 clarity is manifested in the way that the January 2008 IEP sets forth Student's present  
25 levels, by including data showing both [REDACTED]-grade and [REDACTED]  
26 levels in the same areas. Respondent School District's ultimate conclusion that  
27 Student is at the [REDACTED] level is not supported by the evidence.  
28 That conclusion necessitates a finding that Student made no academic progress for the  
29 many months that she had attended ACT before the January 2008 IEP was written, and  
30 such a finding is not supported by the record presented in this matter. Student made

1 some progress; how much progress is not clear. Further, Respondent School District's  
2 conclusion ignores the information reported by ACT and described in the January 2008  
3 IEP. This inconsistency creates a lack of clarity regarding Student's present levels.

4 11. On the other hand, the record does not support a finding that Student is  
5 operating at a [REDACTED]-grade academic level; that, too, is unclear. Certainly, Student's  
6 current teacher and Ms. Oliver would be in the best position to attest to her academic  
7 levels. But the use of FC for Student's academic work samples casts a cloud on the  
8 samples' reliability.<sup>121</sup> The record does not show to what extent those samples are  
9 reliable. Therefore, Student's academic levels remain unclear on this record.<sup>122</sup>

10 12. This tribunal concludes that the evidence does not support the levels of  
11 academic achievement described in the January 2008 IEP and, consequently, does not  
12 support the [REDACTED] academic goals in the January 2008 IEP.

#### 13 The Suspicion That Student Has an Intellectual Disability

14 13. Next, Respondent School District attempts to justify use of the lower  
15 academic levels of performance for drafting the IEP goals by relying on the  
16 "impressions" of Drs. Nicholls and Stafford that Student has an intellectual disability.  
17 However, as this tribunal has found, those "impressions" are merely suspicions and  
18 cannot be used to make decisions about Student's academic levels. Adequate  
19 information does not exist to make a diagnosis of that condition and the evidence in this  
20 record does not support making a factual finding of that condition without such a  
21 diagnosis. Therefore, the unsupported assumption that Student has an intellectual  
22 disability cannot be used as a basis for the lower levels of performance in the January  
23 2008 IEP; it is not reasonable for the January 2008 IEP to make that assumption. Thus,  
24 the lower academic levels in the January 2008 IEP are not supported by sufficient  
25 evidence.

26  
27  
28  
29 <sup>120</sup> *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6<sup>th</sup> Cir. 2001).

30 <sup>121</sup> Respondent School District's skepticism of the claim that Student can perform academically at a [REDACTED]  
grade level is justified.

<sup>122</sup> It is more likely that her level is somewhere in between the two.

The Use of Data From Evaluations Not Performed In Accordance with IDEA Regulation

14. Finally, the evaluations used by the IEP team to make its conclusions about Student's academic levels were not conducted in accordance with IDEA regulations. The record does not show that Student was provided adequate sensory supports during her testing, even though she has significant sensory needs when performing tasks. Evaluations must be conducted in a manner most likely to yield accurate information and not in a manner that merely reflects impaired sensory skills.<sup>123</sup> As Petitioners persuasively argue,<sup>124</sup> that was not done here.<sup>125</sup>

15. Because the January 2008 IEP does not contain a clear and accurate statement of Student's present levels of academic achievement, it is not reasonably calculated to provide meaningful educational benefit.

*B) Is the January 2008 IEP complete? Does it address all needs?*

16. As found above, the January 2008 IEP does not provide for a 1:1 aide for Student, does not address gross motor skills, and does not contain a behavioral management plan. These are found to be clear needs for Student, based on the evidence presented. The failure to address these needs in the January 2008 IEP is a violation of the IDEA for the following reasons.<sup>126</sup>

17. The evidence clearly demonstrates that Student needs a full time 1:1 aide for sensory and behavioral support. If Respondent School District wishes to transition Student to a lower level of support, the IEP team can propose a plan to do so. However, as it now stands, Student needs a full-time aide in any program in which she is enrolled.

18. Furthermore, Student's gross motor skills must be addressed in her IEP. These skills were noted as an area of need in the 2006 California documentation and were not addressed by the IEP team, as required by the IDEA. This oversight must be corrected so that the Student's IEP addresses these needs based either on the

<sup>123</sup> See Conclusion of Law 6 above.

<sup>124</sup> PETITIONERS REPLY BRIEF at 17-20.

<sup>125</sup> This does not mean, however, that the use of FC during testing is appropriate. FC is a communication support, but is unreliable. Use of FC would not yield accurate results.

<sup>126</sup> These are the claims that Respondent School District wanted barred for failure to comply with the complaint amendment procedures. This tribunal denied that motion at page 4 above.

1 California evaluations, which are still current, or, based on any new evaluations that  
2 might be conducted.

3 19. In addition, the evidence clearly demonstrates a need for Student to have a  
4 behavioral management plan in place at the outset of the implementation of any IEP.  
5 Her behaviors impede her ability to learn and that of others as well. This is especially  
6 true if Student will be transitioning to a new program.

7 20. Finally, the January 2008 IEP should have contained a transition program to  
8 wean Student from FC. Given its unreliability, Respondent School District is not  
9 required to offer FC as an accommodation for Student. However, Respondent School  
10 District must recognize that Student has been relying on FC for much of her  
11 communication support while she has been at ACT. She consequently needed a clear  
12 plan for transitioning her to a substitute accommodation.

13 21. Because the January 2008 IEP is not complete in that it does not address all  
14 of Student's needs, it is not reasonably calculated to provide meaningful educational  
15 benefit.

16 22. A new IEP that complies with the IDEA and is reasonably calculated to  
17 provide meaningful educational benefit will need to be created for Student.

18 *C) Issues Raised But Not Decided: Predetermination and LRE*

19 23. Petitioners' main claim in this due process complaint is that Respondent  
20 School District predetermined Student's placement. Since placement is driven by the  
21 IEP,<sup>127</sup> and since a new IEP will need to be drafted for Student, this tribunal need not  
22 address the predetermination issue.

23 24. Additionally, in its defense of the January 2008 IEP, Respondent School  
24 District has argued that the proposed placement at Respondent School District's autism  
25 program is the least restrictive environment. For the same reason just noted above,  
26 this tribunal need not address the issue.

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28  
29  
30  

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<sup>127</sup> 34 C.F.R. § 300.116(b)(2); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6<sup>th</sup> Cir. 2004).



1 *D) Remedy*

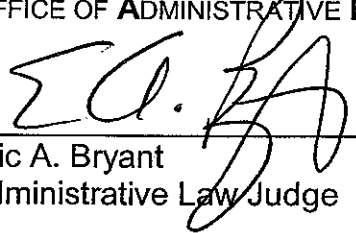
2 25. Because the January 2008 IEP does not comply with the IDEA, Respondent  
3 School District must reconvene an IEP team to draft a new IEP for Student that  
4 provides Student a free appropriate public education consistent with this Decision.

5 **ORDER**

6 Based on the findings and conclusions above, IT IS HEREBY ORDERED that  
7 the relief requested in the due process complaint is **granted**. Respondent School  
8 District must reconvene an IEP team to draft an IEP that provides Student a free  
9 appropriate public education consistent with this Decision.

10 Done this 14<sup>th</sup> day of November 2008.

11  
12 OFFICE OF ADMINISTRATIVE HEARINGS

13   
14 \_\_\_\_\_  
15 Eric A. Bryant  
16 Administrative Law Judge

17 **RIGHT TO SEEK JUDICIAL REVIEW**

18 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this  
19 Decision and Order is the final decision at the administrative level.  
20 Furthermore, any party aggrieved by the findings and decisions made  
21 herein has the right to bring a civil action, with respect to the complaint  
22 presented, in any State court of competent jurisdiction or in a district court  
23 of the United States. Any action for judicial review must be filed within 90  
24 days of the date of the Decision or, if the State has an explicit time  
25 limitation for bringing this type of action, in such time as the State law  
26 allows.

1 Copy sent by **electronic mail** this 14 day of November 2008,  
2 and mailed by certified mail (No. 7001 0360 0002 8217 1914)  
3 this 17 day of November 2008, to:

4 Amy G. Langerman, P.C.  
5 951 Coronado Avenue  
6 Coronado, CA. 92118  
7 Attorney for Petitioners  
8 **alangermanlaw@aol.com**

8 Copy sent by **electronic mail** this 14 day of November 2008,  
9 and mailed by certified mail (No. 7001 0360 0002 8217 1907)  
10 this 17 day of November 2008, to:

11 Denise Lowell-Britt  
12 UDALL, SHUMWAY & LYONS, P.L.C.  
13 30 West First Street  
14 Mesa, AZ 85201-6695  
15 Attorneys for Respondent School District  
16 **dlb@udallshumway.com**

15 Copy mailed by interdepartmental mail this 17 day of November 2008, to:

16 Colette Chapman, Exceptional Student Services  
17 Arizona Department of Education  
18 ATTN: Kacey Gregson  
19 1535 West Jefferson  
20 Phoenix, AZ 85007

21 By 